

BEFORE THE FEDERAL HIGHWAY ADMINISTRATION;--

Federal Motor Carrier Safety )  
Regulations; Transportation of )  
Hazardous Materials )

Docket No. MC-92-4

**FHWA-97-2180-14**

**QA**  
**17794**

Comments to Notice of Proposed Rulemaking

The Public Utilities Commission of Ohio respectfully submits the foregoing Comments to the Notice of Proposed Rulemaking in Docket No. MC-92-4, published in the Federal Register on June 17, 1993.

The Public Utilities Commission of Ohio (Commission) requests that the Federal Highway Administration (FHWA) clarify its statements in the preamble to the proposed rule regarding the preemptive effect of the proposed rule upon state permit programs. Specifically, the Commission requests that the FHWA recognize that state permit programs, promulgated pursuant to § 22 of the Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, 104 Stat. 3244 (1990) (codified at 49 App. U.S.C.A. §§ 1801-1819 (West Supp. 1993)) (hereinafter HMTUSA), are not subject to preemption by the FHWA permit program.

In the preamble to the proposed rule, the FHWA stated that the FHWA hazardous material permit program "would preempt only a State permit requirement dealing with transportation of the same hazardous materials [designated as high risk hazardous materials in the proposed rule] and only to the extent such a State permit is based upon a demonstration of safety fitness."

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Notice of Proposed Rulemaking, FHWA Docket No. MC-92-4, 58 Fed. Reg. 33,418, 33,423 (June 17, 1993).

- I. State permit programs are specifically authorized by § 22 of the Hazardous Materials Transportation Uniform Safety Act of 1990 and are not subject to the preemption provisions of 49 App. U.S.C.A. § 1811(a).

Prior to the enactment of the HMTUSA on November 16, 1990, the Hazardous Materials Transportation Act (hereinafter HMTA), preempted any requirement of a State or local government which was "inconsistent" with the HMTA or any regulation issued under its authority. 49 U.S.C.A. § 1811(a)(West 1975) (amended 1990). The HMTUSA codified the "dual compliance" and "obstacle" tests, established by the Research and Special Programs Administration in Inconsistency Rulings issued under the HMTA and added an additional preemption test for state and local requirements. In codifying these standards, the HMTUSA provided that:

[U]nless otherwise authorized by Federal law, any requirement of a State or political subdivision thereof or Indian tribe is preempted if--

- (1) Compliance with both the State or political subdivision or Indian tribe requirement and any requirement of this title or a regulation issued under this title **is** not possible,
- (2). The State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of this title or the regulations issued under this title, or
- (3) It is preempted under section 1804(a)(4) of this Appendix or section 1804(b) of this Appendix.

49 App. U.S.C.A. § 1811(a) (emphasis added).

However , § 22 of the HMTUSA authorized state registration and permitting of hazardous materials carriers and offerors, provided the states adopt the uniform forms and procedures established by the Secretary of Transportation. 49 App. U.S.C.A. § 1819. The HMTUSA directed the Secretary of Transportation to establish a working group of State and local government officials to prepare recommendations, in consultation with the regulated community, for the Secretary for uniform state registration and permitting forms and procedures. 49 App. U.S.C.A. § 1819(a)-(c).

The HMTUSA provided that after the effective date of the regulations for uniform registration and permitting forms and procedures, "no State shall establish maintain, or enforce any requirement which relates to the subject matter of such regulation unless such requirement is the same as such regulation. " 49 App. U.S.C.A. § 1819(e). This is the only preemption provision in HMTUSA for state registration and permitting requirements; state registration and permitting requirements are specifically authorized by the HMTUSA and are not subject to the preemption provisions of 49 App. U.S.C.A. § 1811(a). Because 49 App. U.S.C.A. § 1819 specifically authorizes state registration and permitting programs subject to only this preemption provision, the implementation of a Federal permitting program can have no preemptive effect upon state permitting programs established pursuant to the 49 App. U.S.C.A. § 1819 authorization.

II. The implementation of the Federal Highway Administration has no preemptive effect upon state permit programs.

Even if the FHWA determines that state permit programs are not "otherwise authorized by Federal law" and thus excluded as a matter of law from the preemption provisions of 49 App. U.S.C.A. § 1811(a), the mere fact that the Federal Highway Administration is implementing the hazardous materials permit program, mandated by § 8 of the HMTUSA does not preempt, as a matter of law, state permit requirements for the transportation of the "designated high risk hazardous materials" subject to the FHWA permit program. State requirements for the transportation of hazardous materials, including state permit programs, are preempted only if the requirement fails the "obstacle" test, 49 App. U.S.C.A. § 1811(a)(1), the "dual compliance" test, App. 49 U.S.C.A. § 1811(a)(2) or the preemption provisions in 49 App. U.S.C.A. § 1811(a)(3).

Under the "dual compliance" test, a state or local requirement is preempted if "[c]ompliance with both the State or political subdivision or Indian tribe requirement and any requirement of [the HMTA] or a regulation issued under [the HMTA] is not possible." 49 App. U.S.C.A. § 1811(a)(1). The critical issue in this test is not whether the state or local requirement creates an additional requirement but whether compliance with both the Federal and state requirements is possible. The implementation of the FHWA permit program merely creates the potential for certain carriers to need to obtain both

a Federal and state permit; there is nothing inherent in the Federal permit program which makes it impossible for those carriers to obtain both the Federal and state permit.

Under the "obstacle" test, a state or local requirement pertaining to the transportation of hazardous materials is preempted if the "requirement as applied or enforced creates an obstacle to the accomplishment and execution of [the HMTA] or the regulations issued under [HMTA]." 49 App. U.S.C.A. § 1811(a)(2). Because the Congress amended the HMTA to specifically authorize state permit programs, state permit programs clearly do not pose an obstacle to the accomplishment and execution of the HMTA.

The third preemption test, 49 App. U.S.C.A. § 1811(a)(3), preempts two specific areas of State and local requirements: "covered subjects," as defined by 49 App. U.S.C.A. § 1804(a)(4); and "routing designations," pursuant to 49 App. U.S.C.A. § 1804(b). Any State or local law or regulation which is not "substantively the same" as a "covered subject" under Federal law is preempted by 49 App. U.S.C.A. § 1804(a)(4). The HMTUSA defined the "covered subjects" as:

- (i) The designation, description, and classification of hazardous materials.
- (ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials.
- (iii) The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents.
- (iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.
- (v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a

package or container which is represented, marked, certified, or sold as qualified for use **in** the transportation of hazardous materials.

49 App. U.S.C.A. § 1804(a)(4)(B)(i)-(v).

Hazardous materials permitting requirements are not enumerated under the "covered subjects," by 49 App. § 1804(a)(4)(B); therefore, the implementation of the FHWA permit program has no preemptive effect pursuant to the "covered subjects" preemption provision.

The third preemption test, 49 App. U.S.C.A. § 1811(a)(3), also incorporates the preemption provision of the Federal routing standards, 49 U.S.C.A. § 1804(b). The HMTUSA mandated that, two years after the effective date of the regulations implementing the Federal routing standards, no state may establish, maintain or enforce a routing designation unless the routing designation meets the Federal Routing standards. 49 App. U.S.C.A. § 1804(b)(4). State permit programs, per se, do not meet the definition of "routing designations," pursuant to 49 App. U.S.C.A. § 1804(b). The implementation of the FHWA permit program has no effect upon the fact that this preemption provision is not applicable to state permit programs.

In addition to the above preemption tests, the HMTUSA included an additional preemption test related to state permit requirements. The HMTUSA provided a separate preemption provision, in addition to the "dual compliance" and the "obstacle" tests cited above, for state and local hazardous materials transportation fees. The HMTUSA preempted any State

fee which is not "equitable" and which is "not used for purposes related to the transportation of hazardous materials, including enforcement and emergency planning, development, and maintenance of a capability for emergency response." 49 App. U.S.C.A. § 1811(b). The implementation of the FHWA permit program has no effect upon the issue of whether state permit fees are "equitable" or "used for purposes related to the transportation of hazardous materials."

III. It is against the public interest for the proposed rule to preempt the uniform state permit program, which is far more comprehensive than the proposed rule.

The uniform state program being prepared by the Alliance for Uniform Hazmat Transportation Procedures (Alliance) is far more comprehensive than the proposed rule. The Federal permit program as set forth in the proposed rule does nothing more than establish the existing FHWA safety rating system as the permit program for the hazardous materials required by § 8 of the HMTUSA. 49 App. U.S.C.A. § 1805(d).

The Alliance was established pursuant to § 22 of the HMTUSA to develop uniform state forms and procedures for the registration and permitting of hazardous materials carriers and offerors. The Alliance consists of twenty-nine state and local officials from twenty-two states. In addition, representatives from industry and environmental groups serve as non-voting members of the Alliance.

Based upon the recommendations of the Alliance, the

Secretary of Transportation **will** issue regulations for uniform state registration and permitting forms and procedures. The report of the Alliance to the Secretary is not due until November 16, 1993, but the uniform state permit program under discussion by the Alliance provides for a comprehensive review of a motor carrier's fitness to transport hazardous materials, which includes review of a carrier's safety rating. The permit program may also include information requirements on and review of: corporate structure and affiliates; hazardous materials registrations and permits; history of violations related to the transportation of hazardous materials, response to reportable hazardous materials incidents; vehicle information; terminal locations; and financial responsibility. This information will provide for a more comprehensive review of a motor carrier's fitness to transport hazardous materials than just the motor carrier's safety rating.

It is against the public interest for the FHWA to establish a comprehensive uniform state permit program for hazardous materials which are presumably "lower risk" hazardous materials but preempt the comprehensive uniform state permit programs for the "designated high risk hazardous materials" with a Federal permit, which is based solely upon the motor carrier's safety rating.

For these reasons, the Public Utilities Commission of Ohio respectfully requests that the FHWA provide a clear



statement in the final rule that state permit programs,  
promulgated pursuant to § 22 of the Hazardous Materials  
Transportation Uniform Safety Act, are not subject to preemption  
by the FHWA permit program.

Respectfully submitted,

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